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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 1065 116

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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New York City,
Counsel.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3242

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Supreme Court of the United States

OCTOBER TERM, 1943

No.

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

Petition

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Despatch Shops, Inc., a corporation duly organized and existing under and by virtue of the Laws of the State of New York, respectfully prays that a writ of certiorari issue herein to review a certain final decision of the Court of Appeals of the State of New York, being the highest court of said State, the opinion and decision of said Court having been rendered and filed on March 2, 1944, on the question whether said decision and

judgment contravened the rights of petitioner under the Fourteenth Amendment to the Constitution of the United States in that by said decision and judgment herein sought to be reviewed the property of petitioner is made subject to levy and assessment for taxes to make up any deficit from the operation of a municipal electric plant and distribution system proposed to be constructed and operated by the respondents, the while petitioner is excluded from any possible service from the proposed plant and system.

Action in the State Courts

An action was originally instituted in the Supreme Court of the State of New York for the County of Monroe by one James O'Flynn, on behalf of himself and all other taxpayers in the Village of East Rochester similarly situated, praying for a judicial declaration that Article 14-A of the General Municipal Law of the State of New York (added by New York Laws of 1934, chap. 281) was unconstitutional and requesting that an injunction issue against the proposed construction by the Village of East Rochester of a municipal electric plant, allegedly pursuant to the provisions of such Article. Petitioner, Despatch Shops, Inc., and others, in accordance with orders entered upon stipulations signed by the attorneys for all the parties, duly intervened in the action and served supplemental complaints (R. 38-47). In its complaint petitioner set forth the various instances in which it was contended that the respondents had failed to comply with the constitutional and statutory provisions of law in proposing this contemplated municipal project. Among other contentions raised by petitioner was that Article 14-A of the General Municipal Law of the State of New York had been applied in an invalid and unlawful manner in such a way as to

violate the constitutional and legal rights of petitioner (R. 45-46).

Specifically, it was alleged that the Constitution of the United States was violated in that petitioner's property will be taken without due process of law; that petitioner's property would be subject to taxation without any benefit since petitioner, Despatch Shops, Inc. (R. 45), will be illegally and arbitrarily discriminated against in that the proposed project excludes this petitioner from all benefit of the current to be generated at the proposed municipal electric plant (said current, however, to be available to all other industrial and commercial users of electricity in the Village (R. 42)), although the property of petitioner, Despatch Shops, Inc., the largest taxpayer in the Village, paying about seven per cent of all the taxes collected in the Village (R. 131; 167) and the largest consumer of electric power in the Village (R. 167), nevertheless will be subject, under the terms of the ordinance initiating said municipal project, to levy and assessment to make up any deficits in the operation of said municipal plant (R. 29). Petitioners complained of this action of the Village officials in deciding upon the unheard of experiment of constructing a municipal generating plant and system for the ostensible purpose, as stated in the ordinance, of authorizing the construction of such public utility service for the "generation, furnishing and transmission of electricity for light, heat and power to the Village of East Rochester or for compensation to its inhabitants," but actually, as conceded at the trial, with no generating capacity to care for the needs of petitioner, Despatch Shops, Inc. (R. 249).

After a trial before an Official Referee judgment was entered dismissing the original complaint, as well as the supplemental complaints filed by petitioner, among others.

From said judgment this petitioner, as well as other intervenors, appealed to the Appellate Division of the Supreme Court in and for the Fourth Judicial Department, where the judgment was affirmed (262 N. Y. App. Div. 556). Thereafter, pursuant to permission granted by the Court of Appeals of the State of New York, petitioner appealed to that Court from said judgment of affirmance. That appeal came on for argument before the highest court of the State of New York on November 22, 1943, and on March 2, 1944, that Court rendered its decision affirming the judgment appealed from, Judges Lewis and Conway dissenting on the constitutional ground. Judgment became final on March 2, 1944.

Opinions of the State Courts

The opinion of the Official Referee,* before whom the case was tried at Special Term (24 N. Y. Supp. [2d] 437, not officially reported), is printed in the Record at pages 179 to 189. The opinion of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department* (262 App. Div. 556) is printed in the Record at pages 662 to 679. The majority opinion of the Court of Appeals (292 N. Y. 156) is printed in the Record at pages 689 to 698, and the opinion of the dissenting Judges of the Court of Appeals at pages 699 and 700.

Jurisdiction

This petition for a writ of certiorari is filed within three months of the time when said judgment became

* The opinions rendered by the Special Term and the Appellate Division dealt not only with the instant case but also with another action, entitled *Village of East Rochester* v. *Rochester Gas and Electric Corporation*, which was concerned with the validity of certain easements of the defendant-corporation. That case is not involved in the present petition to this Court.

final, and there is presented herewith a certified copy of the entire record and proceedings in the action, including those in the Court of Appeals of the State of New York.

This petition for a writ of certiorari is filed under the provisions of Title 28, United States Code, Section 344, paragraph (b); Section 237, Judicial Code, as amended.

Summary and Brief Statement of the Matters Involved

The Issue Involved

The sole issue presented herein is whether a municipal corporation may, pursuant to a legislative grant of power to construct and operate a municipal public utility service (Article 14-A, General Municipal Law, State of New York), construct and operate an electric generating plant and distribution system sufficient to supply the needs of all the inhabitants of the municipality except one—a large industrial consumer of electric power and the largest taxpayer in the municipality—while the property of such excluded inhabitant is subjected under the terms of the very ordinance initiating such project, and the Constitution and statutes of the State, to levy and assessment for a tax sufficient to pay the principal of and interest on the bonds to be issued to finance the project, as the same shall become due, to the extent that funds are not available for that purpose from the revenues of the project. The majority of the Court of Appeals of the State of New York held that the imposition of such a tax would not be arbitrary or descriminatory; that a tax so raised may constitutionally be applied to purposes for which the individual taxpayer receives no benefit, citing among other decisions, *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405. Your petitioner urges that

the Court erred for this Court has repeatedly held that it is a violation of the Fourteenth Amendment to the Federal Constitution for a municipality to impose a tax, particularly one of the nature involved herein, without benefit to the taxpayer (See *Myles Salt Co.* v. *Iberia & St. Mary Drainage Dist.*, 239 U. S. 478; *Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co.* v. *Road Improv. Dist. No. 6*, 256 U. S. 658; *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U. S. 481.)

Facts From Which This Controversy Arises

This case is concerned with the establishment of a municipal electric plant and distribution system for the Village of East Rochester, Monroe County, New York. The Board of Trustees of the Village, after some previous discussion among themselves, engaged engineers to make studies of the feasibility of establishing a municipal generating plant and system for the Village. The engineers concluded that an electric utility system would be practical. Thereafter the Village Board directed the engineers to prepare plans and specifications for the construction of a generating plant and electric distribution system. These plans and specifications were prepared and filed with the Village Clerk and two days thereafter the Board, without any previous notice to the public, met and passed an ordinance providing for the establishment of a municipal plant and a resolution providing for the submission of the proposition to the voters and a notice of special election. At the election thus called—at which both taxpayers and non-taxpayers were permitted to vote—approximately seventy percent voted in favor of the proposition and thirty percent were opposed.

This ordinance purported to authorize the construction of a public utility service for the purpose of "gen-

eration, furnishing and transmission of electricity" to supply "light, heat and power to the Village of East Rochester or for compensation to its inhabitants * * *" (R. 26) and to provide for the issuance of bonds not to exceed $360,000 to finance such project (R. 28). The Village officials in a pamphlet published in support of the project and which was circularized among the voters prior to the election, represented that the plant they proposed to construct and operate would be capable of competing with and in all respects equivalent to that which Rochester Gas and Electric Corporation (the electric utility rendering service to all inhabitants, including petitioner, who desire same), has in said Village (R. 48-66). The fact is, however, that no service whatsoever to petitioner, Despatch Shops, Inc., was contemplated, nor could such service be supplied to this petitioner with the capacity of the proposed plant. Not only was it conceded on the trial that the plant provided for would not have sufficient generating capacity to supply the needs of petitioner, Despatch Shops, Inc. (R. 249), but the reports of the engineers excluded this industrial user as a possible consumer (R. 525).

As previously pointed out in this petition, a taxpayer's action was instituted by one James O'Flynn for a judicial declaration of the invalidity of the proposed project. Because of the peculiar position of petitioner, Despatch Shops, Inc., with respect to this proposed village project, and in accordance with an order entered upon a stipulation signed by the attorneys for all the parties to the action, petitioner duly intervened and served a supplemental complaint. In this complaint, petitioner set forth the various instances in which it contended that the Village officials had failed to comply with the constitutional and statutory provisions of law in proposing their project.

Specifically, so far as this petition to this Court for a writ of certiorari is concerned, petitioner alleged that Article 14-A of the General Municipal Law of the State of New York had in this instance been applied in an invalid and unlawful manner and in such a way as to violate the constitutional and legal rights of petitioner and a judgment to that effect was prayed for (R. 46).

The Decisions of the Courts of the State of New York

The courts of New York State denied the requested relief. While the courts below all denied the relief sought by petitioner, Despatch Shops, Inc., their reasons for such denial were most divergent. Thus, the Special Term said that the resources of the Village were limited and that it was not planned or intended that the Village plant will or can always generate sufficient power to meet the demands of this petitioner. He held that Article 14-A did not make it a prerequisite that a municipal power plant be capable of generating power sufficient to supply the full needs of all taxpayers since it had the power to purchase supplemental energy (See opinion of Official Referee, R. at pp. 184-185). Such reasoning disregarded the fact that the ordinance initiating the project made no provision whatsoever for purchased energy, but was solely limited to the *generation* of electricity by the proposed plant and the distribution of such energy "to the Village of East Rochester or for compensation to its inhabitants * * *" Furthermore, the plans and specifications definitely excluded petitioner, Despatch Shops, Inc., from any service from the proposed plant.

The Appellate Division, in affirming the decision of the Official Referee, recognized the pertinency of the contention of this petitioner with respect to the imposition of taxes

without any attendant benefit, for the Court said that if a deficit in the operation of the municipal project did occur, "the public authorities would be required to spread the tax only on benefited property" (See opinion of Appellate Division, R. at p. 679). If such were the law, petitioner would not be harmed and never would have intervened in this action and would not be petitioning this Court to review the determination reached herein. However, it is clear under the Constitution and the judicial decisions of New York that any indebtedness incurred by a municipality must have pledged behind it for the payment of the principal thereof and the interest thereon the full faith and credit of all taxable property in the issuing municipality (N. Y. State Const. Art. VIII, Sect. 2; *Matter of Tierney* v. *Cohen*, 268 N. Y. 464; *New York Edison Company, Inc.* v. *City of New York*, 268 N. Y. 669; *Gaynor* v. *Marohn*, 268 N. Y. 417).

The majority of the Court of Appeals abandoned this specious reasoning and held that the fact that the ordinance provided that a sufficient tax be levied each year to pay the principal of and the interest on the bonds as the same should become due, to such an extent as funds should not be available for those purposes from the revenues of the project, did not result in arbitrary or discriminatory taxation, saying that "Moneys thus raised may constitutionally be applied to purposes from which the individual taxpayer receives no benefit, and indeed may suffer a serious detriment (*Nashville, C. & St. Louis Ry* v. *Walters*, 294 U. S. 405, 429-430)." (See opinion of Majority of Court of Appeals, R. at p. 698.)

The dissenting Judges of the Court of Appeals based their dissent directly upon this point saying, in part (See dissenting opinion of Judges of Court of Appeals, R. at pp. 699-700):

"In that connection it is to be noted that the statute (*General Municipal Law*, §360, subd. 2), under which the respondent Village claims its power to undertake the project here involved, authorizes it to construct and operate the proposed public utility as an agency to furnish service '*to its inhabitants*', not to a portion thereof. The decision in effect construes the statutory phrase 'to its inhabitants' as meaning that the service to be furnished may be 'to its inhabitants' except a single taxpayer. In this instance that single taxpayer—although denied special benefits to be afforded other inhabitants—concededly may be called upon to pay a large portion of the principal and interest of the bonded debt to be incurred. Insofar as the project will afford to other inhabitants of the Village special benefits which are denied to Despatch Shops, Inc.—although that corporation may be called upon as a taxpayer to meet its share of the cost and maintenance of the plant—I believe the plan as now formulated will result in an unconstitutional taking of property through illegal taxation. (See *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 485.)"

Thus, it can readily be seen that despite the unanimity of decision of the judges of the courts of the State of New York who have passed upon this case (with the exception of the two dissenting judges of the Court of Appeals of the State) there is a wide divergence in the reasons supporting such conclusion.

The Question Presented

The question presented to the Court in this case, as hereinbefore indicated, may be concisely stated as follows:

Whether a municipal subdivision of a State having authority under a general legislative enabling act to erect and operate a municipal electric gen-

erating plant and distribution system within the municipality, may construct and place into operation an electric system, which concededly will be sufficient to serve all the inhabitants save one—the largest taxpayer and largest consumer of electric power in the municipality—but nevertheless subject the property of such excluded taxpayer to levy and assessment in order to pay the principal of and interest on bonds, which are to be issued to finance the project, as the same shall become due and payable to the extent that funds are not available for that purpose from the revenues of the project?

Reasons For Allowance of the Writ

Your petitioner respectfully shows to this Court that this is a question of utmost importance, involving municipal undertakings of the nature embraced in this lawsuit. If the law as presently enunciated in the decision of the majority of the Court of Appeals of the State of New York is permitted to stand, it means that any municipality may venture into a field purely "proprietary as contrasted with its governmental capacity" (*Matter of Village of Boonville* v. *Maltbie*, 272 N. Y. 40, 46; see also *Los Angeles* v. *Los Angeles Gas & Electric Co.*, 251 U. S. 32) with the expressed intention of serving only a limited number of the taxpayers of the municipality from the contemplated project and nevertheless subject the taxable property of those excluded from all benefits from the proprietary enterprise to levy and assessment to make up any deficit resulting from the operation of the enterprise. Such a proposition, it is submitted runs counter to the provision of the United States Constitution that property shall not be taken without due process of law.

The reasoning of the Court of Appeals of the State of New York abandons in this instance all distinction be-

tween the governmental functions, which a municipal corporation may exercise and levy taxes to support even though in some particular instance there is no specific benefit to the taxpayer, and the embarking upon a proprietary venture designed to serve some, but not all, of the inhabitants, but nevertheless subjecting the property of the excluded inhabitants to taxation to support such a project. It is believed that under our Federal Constitutional safeguards the latter cannot be done. But it is submitted such is just what the decision of the New York Court of Appeals permits.

The importance of this question transcends the immediate issues between petitioner and the respondents for the principle engrafted on the Constitution is not of limited or local application. It is believed that the decision of the Court of Appeals of New York in this respect, as is pointed out in the brief accompanying this petition and attached hereto, is contrary to the doctrines enunciated by this Court regarding the fundamental principles of taxation.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, directing that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and the proceedings had herein, to the end that the cause may be reviewed and determined by this Court as provided by law, that the judgment may be reversed, and for such other and further relief as may be appropriate and granted in the premises.

Despatch Shops, Inc.
By Martin J. Alger,
President.

Daniel M. Beach,
Attorney for Petitioner.

State of New York)
County of ~~Monroe~~ NEW YORK) ss.:

MARTIN J. ALGER, being duly sworn deposes and says: That he is the President of DESPATCH SHOPS, INC., the petitioner above-named, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein and that such statements are true, except those stated to be upon information and belief, and those he believes to be true.

MARTIN J. ALGER.

Subscribed and sworn to before me)
this 26th day of May, 1944.)

WM. F. McGINN
NOTARY PUBLIC, WESTCHESTER COUNTY
CERT. FILED IN N. Y. CO. No. 101, REG. No. 71 Mc 5
COMMISSION EXPIRES MARCH 30, 1945

State of New York)
County of Monroe) ss.:

DANIEL M. BEACH, being duly sworn, deposes and says: That he is the attorney for the petitioner in the foregoing petition; that he has read the said petition and has personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiant further states that the said petition for a writ of certiorari is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to be vexatious or to delay the final opinion and judgment in the case.

DANIEL M. BEACH.

Subscribed and sworn to before me)
this day of May, 1944.)

.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No.

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

BRIEF

Petitioner's contention in its application to this Court for a writ of certiorari is that by reason of the circumstances surrounding this proposed municipal project, the petitioner has been treated in a patently arbitrary and unconstitutional manner. Such contention is based upon the conceded facts that despite its being the largest taxpayer in the Village, as well as the largest consumer of electric power, it is excluded from any possible service from this proposed municipal electric plant and system, and yet under the constitution and laws of the State of New York and the very terms of the initiatory ordinance itself, its property, assessed at $400,000 out of a total

assessed valuation for the village of $5,829,790 (p. 156-157), is made subject to levy and assessment for taxes to make up any deficit arising from the construction and operation of the proposed plant.

It is difficult to conceive of a more glaring example of subjecting a taxpayer to stand behind a project without the possibility of receiving any benefit therefrom. Thus, we submit, the proposal falls within the express condemnation enunciated by decisions of this Court of which *Myles Salt Co.* v. *Iberia & St. Mary Drainage Dist.*, 239 U. S. 478, is a leading example.

We wish to emphasize that this petitioner does not contend that Article 14-A of the General Municipal Law of the State of New York (added by Chap. 281 of the Laws of 1934) *is unconstitutional.* However, **"the law as [it would be] administered and [as such administration has been] justified by the [Court of Appeals] of the state is attacked, and it is asserted to be a violation of the Constitution of the United States"** (*Myles Salt Co.* v. *Iberia & St. Mary Drainage Dist.*, 239 U. S. at p. 484).

As is well known, the constitutionality of a statute depends, not so much on abstract theories of philosophy, but upon a very practical application of laws to the facts, and a statute which is valid as to one set of facts may be invalid as to another. Likewise a statute which generally is not within any constitutional prohibition may become invalid by reason of burdensome or unreasonable application to the conditions to which it is applied (*Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405, 414, 415). And we maintain that Article 14-A of the General Municipal Law, under the project as proposed by the respondent-Village and as sanctioned by the State Court rulings, has been applied in a grossly invalid and unlawful manner so as to violate the rights of petitioner

as protected by the Fourteenth Amendment to the Constitution of the United States.

Basically, the facts and circumstances in the instant case cannot be distinguished from those existing in the *Myles Salt Co.* case, *supra*. There a drainage district was created for the construction and maintenance of a project for the purpose of draining certain lowlands in southwest Louisiana. The State statutes permitted the creation of such districts when in the opinion of the police juries of adjoining parishes such a district was necessary. Included in the district, however, was certain land, known as Weeks Island, which was not lowland, but was in fact one of several islands of "the highest uniform elevation above sea level in southwest Louisiana." The topography of this Island was high and rolling, and in lieu of needing drainage the problem was to guard against washing and erosion. Weeks Island was the highest assessed piece of property in the district and could not possibly benefit from the project. An election was held and the proposition to impose an *ad valorem* tax of five mills on all property within the district (including, of course, Weeks Island), to pay for bonds to be issued by the district, was carried.

The Salt Company, which owned and worked the Island, refused to pay the tax and brought suit to restrain the sale of its lands for such non-payment. The State Courts dismissed its petition, but upon error to this Court, the Company's position was sustained. It was held that the scheme there called into question came within the limitation on state power and that it was a flagrant abuse of such power. This Court said:

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to in-

> clude property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to the other property, there is an abuse of power and an act of confiscation. *Phillip Wagner* v. *Leser, supra* [239 U. S. 207]. We are not dealing with motives alone, but as well with their resultant action; *we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind*" (239 U. S. at p. 485; italics supplied).

In the present situation we have the Village officials proposing to construct a municipal electric generating plant and distribution system, purporting to act pursuant to a delegation of authority by State statute (Article 14-A of the General Municipal Law). The ordinance initiating the project describes it as one to authorize the "construction of a public utility service for the purpose of generation, furnishing and transmission of electricity for light, heat and power to the Village of East Rochester or for compensation to its inhabitants * * *" (R. 26) and to provide for the issuance of bonds of the Village not to exceed $360,000 to finance the project (R. 28).

Actually, however, as conceded at the trial, the plant provided for in the plans and specifications, upon which the proposal as submitted to the electors was based, would not have sufficient generating capacity to supply petitioner, Despatch Shops, Inc. Furthermore, the reports of the engineers retained by the Village officials to study the feasibility of establishing a municipal electric plant and system for the Village and the plans and specifications prepared by them excluded petitioner as a possible user.

Thus we have an instance of direct and express exclusion of the petitioner, whose land in the Village as found by the Trial Court, "occupies a distinct area of approximately eight acres in the Village of East Rochester," (R. 169) from any and all benefit from the proposed project.

Despite this exclusion the ordinance in question provides:

> "A sufficient tax shall be levied each year to pay the principal of and interest on said bonds as the same shall become due to the extent, if any, that funds are not available for the purpose from revenues of the Project. The faith and credit of said Village are hereby pledged for the payment of the principal of and interest on said bonds." (R. 29).

Such a provision had to be included in accordance with State Constitutional requirements.

> N. Y. State Constitution, Art. VIII, Sect. 2;
> *Matter of Tierney* v. *Cohen*, 268 N. Y. 464;
> *New York Edison Company, Inc.* v. *City of New York*, 268 N. Y. 669.

Hence, although specifically excluded from all benefit from the project, petitioner's property—the largest assessed in the community—is expressly made subject to levy and assessment, along with all other taxable property in the Village, to make up any deficits that may occur in the operation of the venture. Under such circumstances it would seem unquestioned that such is "palpably arbitrary, and therefore a plain abuse of power, [and] it falls within the condemnation of the due process clause (*Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262, 265; *Valley Farms Co.* v. *Westchester County*, 261 U. S. 155); and * * * manifestly and unreasonably discriminatory

[and] it falls within the condemnation of the equal protection clause (*Gast Realty & Invest. Co.* v. *Schneider Granite Co.*, 240 U. S. 55; *Kansas City S. R. Co.* v. *Road Improv. Dist.*, 256 U. S. 658; *Thomas* v. *Kansas City S. R. Co.*, 261, U. S. 481; *Road Improv. Dist.* v. *Missouri P. R. Co.*, 274 U. S. 188)." (*Memphis & Charleston Railway Co.* v. *Pace*, 282 U. S. 241, at p. 246).

And yet the New York Courts have determined that the imposition of a tax against petitioner in these circumstances would not be "arbitrary or discriminatory" (See opinion of majority of Court of Appeals, R. at p. 697). We respectfully submit, as the dissenting Judges point out (See dissenting opinion, R. at p. 700), that the subjection of petitioner's property to taxation under the circumstances found to be present in this case, where "the project will afford to other inhabitants of the Village special benefits which are denied to Despatch Shops, Inc., although that corporation may be called upon as a taxpayer to meet its share of the cost and maintenance of the plant * * * will result in an unconstitutional taking of property through illegal taxation. (See *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 485.)"

In the only other instance in New York State where something similar to the plan formulated by the Village of East Rochester was attempted, the attempt was struck down by the Court of Appeals. Reference is made to *Gaynor* v. *Marohn*, 268 N. Y. 417. There the State Legislature passed a Power Authority Act for Albany County by which it created a power district, which specifically took in all the territory in the county except four towns which were excluded. There, as in the present case, the bonds to be issued to finance the project were to be payable in the first instance out of the Authority's funds; but

it was further provided that "such bonds shall be a county charge and the board [of supervisors] may if necessary levy general county taxes for the payment of the principal and the interest thereof" (N. Y. Laws 1935, Chap. 842. Sect. 14).

The Court of Appeals held the Authority Act unconstitutional, insofar as it authorized the County to issue bonds which would become a charge upon the property, by reason of taxation, within the terms of the Act excluded from all benefit from the project. In so ruling the Court of Appeals, in line with the decisions of this Court, said:

> "* * * the county * * * cannot use county money raised by taxing an excluded district to pay for the lighting or for furnishing of power within a restricted district within the county. (*Village of Kenmore* v. *County of Erie*, 252 N. Y. 437.) * * * property without the district cannot be taxed to pay for benefits within it. (5 McQuillin on the Law of Municipal Corporations, p. 575, §§ 2166-2169.) Only such land as is included in the district can be assessed." (268 N. Y. at p. 428)

The Court in that case further said (at p. 430):

> "In a word, we may state the law to be this: The State may authorize cities, villages or counties, as it has done by the provisions of the General Municipal Law, to establish lighting and power plants and systems. So, too, it may create power districts for this purpose, whether they embrace a county, or a portion of a county, or many counties, but the money to be raised for this purpose, if it is to come from taxation, must be limited to a tax or assessment upon the property benefited. For instance, the county of Albany cannot be taxed for the purpose of lighting the county of Rensselaer, which goes untaxed."

In this case, review of which by this Court is sought by this petition, the majority of the Court of Appeals passed over the decision in *Gaynor* v. *Marohn* without even so much as mentioning it, although it is clearly indistinguishable from the situation presented in the instant case as well as the past decisions of this Court discussed above.

Conclusion

The petition for a writ of certiorari to the Court of Appeals of the State of New York, directing that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and the proceedings had herein, to the end that the cause may be reviewed and determined by this Court should be granted.

Respectfully submitted,

DANIEL M. BEACH,
Attorney for Petitioner.

DANIEL M. BEACH,
PAUL FOLGER,
Of Counsel.

(23)

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Respondents.

BRIEF FOR RESPONDENTS
In Opposition to Petition for Writ of Certiorari

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Rochester, New York.

Daily Record Company,
Rochester, New York.

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Reference Marks:

"R" with numeral means page of printed record.

"D.S." means Despatch Shops, Inc.

"D.S.B." means Despatch Shops, Inc. Brief.

Numbers standing alone mean folios of printed record.

"F" with numeral means a finding of fact.

"R.G. & E." means Rochester Gas & Electric Corporation.

Opinions in Courts Below.

Village East Rochester v. R. G. & E. Corp., 262 A. D. 556.

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A.

Statement of the Case

(The following page references are to this Brief)

B.

Summary of Argument

A.

STATEMENT OF THE CASE

The following are, we believe, the facts to which the law is to be applied:

1. *Reasons for Planning the Project.*

R.G. & E., a gas and electric utility, has been serving the Village for a long period of years. It still continues and will continue so to do. In 1933, its rates for lighting the Village streets were questioned. After protest, the rates were somewhat reduced but only to an amount which the Village believed still to be excessive, and which were much more than the cost of the same service which might be rendered by a Village Plant. The Village, being unable to secure a further deduction, determined to establish a municipal plant under the provisions of the General Municipal Law of the State of New York for the principal purpose of operating its water system; the lighting of streets and public buildings; and other Village purposes. As an incident and to reduce the cost of energy consumed by itself it determined to build a generating plant somewhat larger than needed for its own purposes and sell the excess to private consumers. (R. 303, 305, 308, 312, 367, 368, 369, 370).

2. *The Situation Generally.*

It was recognized by all concerned that the project would and must be competitive. (**F.** 21; R. 161, R. 61.) D.S. admits that it was to be competitive; that it would not be permitted to serve all. (D.S.B. p. 7.)

R.G. & E., beyond question, would continue to serve. It was certain that, regardless of the size of the *generating*

plant, D.S. would not purchase energy from the Village but would continue to purchase from R.G. & E. because the R.G. & E. rates to D.S. were so low that the Village could not expect to gain D.S. as a customer. (**F.** 29; R. 163.)

R.G. & E. serves a vast area in many counties, including the City of Rochester. If the Village were to build a *generating* plant large enough to supply D.S., the cost of serving D.S. would be greater than the price charged D.S. by R.G. & E. It would operate only an isolated plant in a very limited area. The present wholesale rate charged by R.G. & E. to D.S. is $1.12 per Kwh. which is well below the cost of production of any plant operated as an isolated unit and serving only the Village. (R. 289; R. 525.)

The problem confronting the Village was how much energy *could* be sold, and, therefore, how large a generating plant should be built. The size of the generating plant had nothing to do with the capacity of the distributing system which was adequately planned for distributing to all including D.S. It was also recognized that even all of the inhabitants would not take from the Village plant but would continue to take from R.G. & E.

3. *Waste Involved if Larger Generator Were Built—Losses.*

The cost of the project, with the generating plant specified and a distributing system adequate to serve all, including D.S., was $360,000. (**F.** 24; R. 162.)

To construct a plant sufficient to *generate* the peak load of D.S. would cost $900,000. (**F.** 68; R. 172; **F.** 26; R. 162).

To build a generating plant large enough to *generate* the peak load of D.S. would involve an operating loss to be met

by taxation upon all—including a large loss to D.S. Of course, rates could be increased so as to obviate such a loss, but this would mean that if D.S. were to buy, its rates would compare still more unfavorably with those established by R.G. & E. And, if D.S. did not take, the operating deficit would then be much larger. D.S. would not buy. (**F.** 27; R. 162.)

And so the Village determined to build a generating plant which would be *adequate to generate* all the current which would be necessary to serve all consumers who could be expected to take. If D.S. did so insane a thing as to purchase from the Village at much greater rates than it was enjoying from R.G. & E., the Village could serve it through purchased energy.

The losses incurred by operating a generating plant large enough to generate the peak load of D.S. would be caused in part by the violent fluctuations in D.S. demands.

The consumption of D.S. for certain years was as follows:

1929—6,000,000 Kwh.
1930—6,000,000 Kwh.
1933—1,000,000 Kwh.
1934—1,000,000 Kwh.
1938—1,000,719 Kwh.
1940—6,000,540 Kwh. (12 months ending 8/1/40)
(**F.** 22; R. 161.)

The annual consumption of the Village, excluding D.S., is approximately 3,000,000 Kwh. A purchase by D.S. of 6,000,000 Kwh. in any one year would represent two-thirds of the total consumption of the Village, while a consumption of 1,000,000 Kwh. in any one year would represent one-fourth of the total consumption of the Village.

However, the Village could buy and sell to D.S. The Court so found. (**F.** 30; R. 163; Ex. 12; In evidence R. 245; appears R. 506; particular reference R. 572.)

(See Subsection 2 of Section 360 of General Municipal Law in Appendix.)

The excess in the cost of construction of a generating plant adequate to generate for D.S. over the cost of the plant in contemplation would be more than $500,000. To produce 1,719,000 Kwh. in a year such as the year 1938 with a bond issue of $900,000 would involve an *additional* bond amortization and interest of $48,600 in the first year, and an increased cost for fuel oil of $9,240, making a net increased cost to the Village of $57,840 over and above the cost of the proposed plan. But in 1938, D.S. paid for its energy only $30,209 (R. 343, 344, 505.) In the same circumstances, in 1933 or 1934 the cost to the Village in each year to serve D.S. would have been approximately $54,750 (R. 379, 380), but the amount paid by D.S. to R.G. & E. for energy in each of those years was in the neighborhood of $18,000 (Ex. 26; In evidence R. 347, appears at R. 637). In other words, the loss to the Village in each of those years would be in the neighborhood of $36,750. This loss, being paid through taxes, would cost the D.S. 7% of the loss, because D.S. pays 7% of the total taxes. (R. 344; D.S.B. 5.) Ninety-three (93%) per cent would be borne by the people of the Village. If the $900,000 plant were built and if D.S. did not buy, the additional cost in the first year would be $48,600 for Bond retirement and interest caused by a plant with nearly three times as large a capacity as the one planned—two-thirds of which could not be used. And yet D.S. claims that the General Municipal Law requires that such a loss must be incurred if any plant is to be built. Such a conclusion would deprive the benefits of

the General Municipal Law to all villages in a situation such as ours.

4. *D.S. will benefit under the proposed plan, but a plan involving a generator which it is claimed must be built would be a distinct disadvantage to it.*

The State Court *found* that the project "would result in a benefit to Despatch Shops, Inc. and a lower tax liability than under any plan involving the construction and operation of a generating plant large enough to serve all the demands and requirements of Despatch Shops, Inc." (**F.** 28; R. 162.)

D.S. would be benefited under the present plan by the result of:

a. Three times the street lighting at about one-third of the present cost. (R. 312; 313.)

b. A lesser cost for energy used by the Village, e. g. for operating the Village water plant, lighting fire houses, and public buildings, and energy used for other general and Village purposes.

c. Sharing in the general community benefits for itself and 1,200 of its employees, most of whom reside in the Village. (**F.** 60; R. 169.)

d. The project will be "self-liquidating and profitable and will not involve any deficit in the cost of operations to be met by a general tax". (**F.** 33; R. 164.)

e. Even if, contrary to the findings of fact, a loss in operations were to be incurred, the "loss could be immediately liquidated by an increase in rates with-

out the levying of general taxes to meet any deficit." (**F.** 34; R. 164.) (*Village of Boonville v. Maltbie*, 272 N. Y. 40; 245 A. D. 468.)

It is indisputable that as a matter of law a municipal utility is enttiled, the same as a private utility, to a reasonable return upon all of its property used and useful in the public service. (*Matter Village of Tupper Lake v. Maltbie*, 257 A. D. 753, 756.)

"The possible lack of wisdom is not the lack of authority." (*Kelly v. Merry*, 262 N. Y. 151, 169.)

See also:

McCabe v. City of New York, 213 N. Y. 468.

Talcott v. City of Buffalo, 125 N. Y. 280, 288.

Pilbeam v. Sisson, 204 A. D. 762, 767.

f. For D.S. to buy energy generated by the Village plant would cost the D.S. even more though the rates were not raised.

No question is raised, and none could be successfully raised, as to the power of the Village, with the approval of its electorate, to establish a plant even though rates were higher than the rates which another utility might charge.

5. *The Ordinance.*

a. The ordinance did not provide for the exclusion of any consumer and did not exclude the purchase of energy by the Village, and its sales to D.S., in the event that D.S. should, improvidently and in utter disregard of its own interests, conclude to buy.

b. It did not suggest that all energy delivered would be generated at a Village generating plant.

c. The Statute does not require that any or all energy sold must be generated at a municipal plant.

d. To buy and sell to D.S. requres only a distribution system and the proposed distribution system would be adequate to serve all of D.S. demands. The ordinance defined "system of furnishing" as including the distribution system. (Ordinance Section 1 (b) R. 25, 26.) z

6. *The Village Solution of the Problem.*

The Village determined not to build a generating plant whose capacity would generate three times the current which could be sold. It determined to build a plant which would be profitable and avoid any possible question of general taxes to cover an operating deficit. It decided to exercise ordinary common sense.

No intelligent person would plan to build a plant whose capacity would be three times the capacity necessary to satisfy a normal demand merely to meet an occasional temporary maximum demand, particularly when the overwhelming probabilities (and in this case a certainty) were that there never would be any such maximum demand. The plan was designed to meet a maximum normal demand under *competitive* conditions. The contention of the petitioner, if adopted, would require that each of two or more competitors should build a plant large enough to meet *all demands of all customers of all competitors.* Certainly, the law does not require such waste. And the elimination of such waste is not an arbitrary and palpable abuse of power.

B.

THE ARGUMENT

—

POINT I

The action of the Village does not affect or impair the constitutional rights of the petitioner.

1. *As to the claimed taking of property in violation of the Federal Constitution.*

We have shown that D.S. would receive benefits. But even if it did not, the planned project would not be frustrated by constitutional inhibitions.

This is not a case involving special taxes or a *local* improvement or district created and established for special purposes as a restricted area in a municipality larger than itself or as an area made up of parts of two or more municipalities for special purposes, such as drainage, sewers, and others.

This case involves an area coincident with the Village and for general Village purposes. The project is a Village project. The General Municipal Law of New York creates powers, like those involved here, only to municipalities—not to "districts". (See Appendix.) The Village project is not a "local improvement" in a district different from the Village itself. In cases like the one at Bar, benefits to all are not required unless the imposition upon the taxpayer is arbitrary and a palpable abuse of power. But the Village has not acted in an arbitrary manner and it has not attempted to exercise a palpable abuse of power.

Even in "district" cases taxes may be levied on all within the district even though some receive no benefit.

As was said in *Nashville, etc. v. Walters*, 294 U. S. 405 (a local improvement case):

> "While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive *no benefit, and indeed, suffer serious detriment;* St. Louis & S. W. R. Co. v. Nattin, 277 U. S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438; Memphis & C. R. Co. v. Pace, 282 U. S. 241, 246, 75 L. ed. 315, 320, 51 S. Ct. 108, 72 A. L. R. 1096; so-called *assessments* for public improvements laid upon *particular property owners* are ordinarily constitutional only if based on benefits received by them."

In *Missouri Pacific Railroad Company v. Western Crawford Road Improvement District*, 266 U. S. 187, a road improvement district was created by a special act. Preliminary expenses were a first lien on all the land in the *district* and were to be paid by a tax on property in the district. The railroad objected to the tax upon the ground that the tax was not spread in proportion to the amount of benefits. This court said:

> "So far as concerns the Federal Constitution, the validity of the tax may be rested, also, on other grounds. A state may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property specially benefited thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by *general taxation.* The cost may be defrayed out of state funds, or a tax district may be created to meet the authorized outlay. The preliminary inquiry whether it is desirable to construct the road is one in which all landowners within the district are interested. The 14th Amendment *does not require* that taxes laid for this purpose *shall be according to the benefits* to be received by the person or thing taxed."

In *St. Louis & S. W. R. Co. v. Nattin*, 277 U. S. 157, an ad valorem tax was levied as against a road district. This court said:

> "As the assailed tax was *general* and *ad valorem*, its legality *does not depend* upon the receipt of any *special benefit* by the taxpayer."

In *Valley Farms Co. v. Westchester County*, 261 U. S. 155, a taxpayer sought a cancellation of a tax to pay the cost of a sewer. The taxpayer could not be benefited by the construction and operation of the sewer. The court said:

> "* * * Taxes for construction and maintenance are based wholly upon assessed valuations for general purposes. Each lot is taxed *according to value, and irrespective of benefits received.*"
>
> * * * * * * *
>
> "The argument proceeds thus:"
>
> * * * * * * *
>
> "That plaintiff's Tibbetts valley lands are so situated that they can never utilize any part of the sewer system except the lower portion of the outlet sewer, and this will be possible only through costly connections not yet planned."
>
> * * * * * * *
>
> "The courts below have upheld the assessment under the Constitution and laws of the state. We are concerned only with application of the 14th Amendment."

This court upheld the tax.

In *Miller, etc. v. Sacramento, etc.*, 256 U. S. 129, the taxpayer claimed that he had received no special benefits in a drainage district for which he was taxed. The court said:

> "* * * the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary

> action, a state may establish drainage districts and tax lands therein for local improvements, and that *none of such lands may escape liability solely because they will not receive direct benefits.*"

See also:

Wagner v. Leser, 239 U. S. 207.

Houck v. Little River, 239 U. S. 254, 262.

Paducah-Illinois R. Co. v. Graham, 46 F. 2d 806.

Nashville, etc. v. Wallace, 288 U. S. 249.

2. *Comments on Petitioner's citations.*

None of Petitioner's citations involve a project designed by a municipality to serve its own municipal purposes as authorized by Statute. They all involved districts and local improvements except the *Los Angeles* case mentioned below. The *Los Angeles* case involved no such issues as are involved in the case at Bar.

In *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, the question was whether a tax was arbitrary and unreasonable. The improvement had to do with a railroad underpass. The railroad was compelled to pay one-half the cost. The railroad had attempted to introduce evidence in the State court to the effect that the assessment against it was arbitrary and an abuse of power. The State court refused to consider such evidence and this court held the exclusion to be error and ruled that this court had no occasion to consider the facts as to whether the tax was arbitrary and unreasonable. It reversed the State court and remanded the case for further proceedings, saying:

> "While moneys raised by *general* taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit and indeed suffer detriment; * * * so-called *assessments*

for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

In the case at Bar, the situation is entirely different. The New York Statute provides that it is a Village purpose to erect this plant, and that bonds issued to defray the cost are Village bonds to be paid by general taxation. (General Municipal Law, Section 360, Subdivision 2, and Section 362; See appendix.)

In *Memphis & C. R. Co. v. Pace,* 282 U. S. 241, a taxpayer sought to enjoin the collection of a tax which was levied to make a partial payment on bonds of a road district which had been created by statute.

Among other things, the court said:

> "Whether the tax shall be *statewide* or confined to the county or local district wherein the improvement is made, and whether it shall be laid *generally on all property* or all real property within the taxing unit, or shall be laid *only on real property specially benefited,* are matters which rest in the *discretion of the state,* and are *not controlled* by either the *due process* of the equal protection clause of the 14th Amendment."
>
> * * * * * * *
>
> "Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor, where the tax is thus general and ad valorem, does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community."

The plaintiffs sought to show that the new roads would be of no benefit to it, and the court said:

> "The chief complaint made here is that the imposition of the tax on an ad valorem basis was 'inher-

> ently invalid' under the due process and equal protection clauses. That complaint is not tenable, as is shown in several cases before cited. And as the tax was general and ad valorem, its validity, as was held in St. Louis & S. W. R. Co. v. Nattin, 277 U. S. 157, 72 L. ed. 830, 48 S. Ct. 438, supra, 'does not depend upon the receipt of any special benefit by the taxpayer.' "

The tax was upheld.

In *Road Improvement District 1 v. Missouri Pacific Railroad Company*, 274 U. S. 188, a taxpayer sought to annul an assessment for the cost of a road improvement. No municipal project was involved.

The Trial Court found that the assessment against the railroad was plainly arbitrary and unreasonably discriminatory. The *Statute directed* payment in the form of *special taxes measured by benefits.* The railroad was assessed on realty and *personalty* alike while *all others were taxed on realty alone.* This court held that the lower court finding that the tax was arbitrary was correct.

In *Thomas v. Kansas City, etc.*, 261 U. S. 481, there was a suit by a railroad to restrain the enforcement of a tax to pay for the cost of a drainage district created by special law. The Trial Court held that the tax on the railroad was palpably arbitrary for the reason that the railroad had no direct benefit and its *40.43 acres* in the district were subject to a tax of *$4,194.60,* while *12,000* other acres in the district were subject to a tax of *$3,151.52.* This court said:

> "The legislature's determination that lands will be benefited by a public improvement for which it authorizes a special tax is, ordinarily, conclusive. Its action in so doing cannot be assailed under the

14th Amendment, unless it is palpably arbitrary or discriminatory."

* * * * * * *

"To justify an assessment upon property the benefit from the improvement need *not be a direct one*. It may, in case of a railroad, consist of gains derived from increased traffic."

The holding in *City of Los Angeles v. Los Angeles Gas & Electric*, 251 U. S. 32, has no application here. The City, intending to establish its own electric system, adopted an ordinance requiring an existing public utility to remove those of its poles and other structures in areas in which the city might wish to erect installations of its own. A penalty for violation was attached. This court held that a municipality could not, as a matter of public right, clear a space for its own construction by removing or relocating the facilities of a privately owned lighting company occupying streets under a franchise legally granted, unless the owner was compensated. In the instant case, the Village does not intend to interfere with the physical properties of any one.

In *Gast v. Schneider*, 240 U. S. 55, the city by ordinance created a tax district within its own limits which was to be taxed for a street paving improvement—a local improvement. The tax was held arbitrary.

Mr. Justice Holmes, in his opinion, said:

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse."

He further said that the ordinance involved was "a farrago of irrational irregularities throughout."

In *Kansas City Southern Railway v. Road Improvement District,* 256 U. S. 658, the Legislature caused to be created a road improvement district. The railroad taxpayer was taxed on 9.7 miles of main track for $67,900—or $7,000 per mile. 11.2 miles of gravel road constituted the improvement. It was a local improvement and no standards had been set for determining benefits. The court held that the circumstances made the tax distriminatory and palpably arbitrary.

In *Houck v. Little River Drainage,* 239 U. S. 254, there was involved an action to restrain the collection of a tax to pay for the cost of a drainage district. The court said:

> "And, as we have said, unless the exaction is a flagrant abuse, and by reason of its *arbitrary* character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power."

In *Myles Salt Co. v. Board of Commissioners,* 239 U. S. 478, a drainage district had been established, but by reason of the contour of the land within the district the elevated land of the taxpayer could not receive any benefit whatsoever, the whole purpose being for drainage. The court accentuated the fact that a drainage district has a special purpose of the *improvement of particular property,* and that where there could be no drainage of a taxpayer's property the tax would be arbitrary. This *Myles* case was distinguished by this court in *Mount St. Mary's Cemetery Association v. Mullins,* 248 U. S. 501, which involved a sewer assessment.

In the *Mount* case, this court said:

> "This case is *not within* the principle of *Myles Salt Co. v. Iberia & St. M. Drainage District,* 239 U. S. 478, 60 L. ed. 392, L. R. A. 1918 E, 190, 36 Sup. Ct.

> Rep. 204, where it was sought to embrace property in no wise benefited within the limits of a *drainage district.*"

The *Myles* case was also distinguished by this Court in *Valley Farms v. Westchester,* 261 U. S. 155, in which latter case this court said that the *Myles* case presented

> "facts deemed sufficient to show action 'palpably arbitrary and a plain abuse' of power. Here the allegations make out *no such situation.* All lands within the district ultimately may be connected with some portion of the sewer, and we cannot say that they derive no benefits therefrom or that any were included arbitrarily or for improper purposes."

In Petitioner's Brief, at page 18, the quotations from the *Myles* case included this language "we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of *others*—power, therefore, arbitrarily exerted imposing a burden without a compensating advantage of any kind." No municipality was involved.

In *Gaynor v. Marohn,* 268 N. Y. 417, was before the New York Court of Appeals in its consideration of the case at Bar. It must be that the New York Court considered this *Gaynor* case as not pertinent to the issues in the case at Bar. Either the *Gaynor* case in the New York Court was held not to affect the issues in this case, or the State Court has overruled it in so far as the facts in the case at Bar are concerned.

The *Gaynor* case had to do with a territorial district not co-incident with the boundaries of any municipality.

In the *Gaynor* case, a light, heat and power district within the County of Albany was created. *Territorially* and geographically four towns within the County were excluded from the district, but the bonds to be issued were a County charge. The Court held that the County could not use County money through taxation on the County as a whole to pay for lighting or power in a district territorially excluded from towns which were not to be benefited. It was not a county project. It was a project for part of a county.

The Court said:

> "But *property outside the district cannot be taxed* to pay for benefits within it. * * * Of course, a county could light a particularly dark spot and make it a County charge."

That is to say street lighting could be done in a small and restricted area within the county and be made a county charge.

In the *Gaynor* case the project did not apply to the county as such but only to a portion of the county. The towns excluded territorially were not to be lighted, nor were its schools, other town buildings or purposes to be furnished with energy. The entire argument of the court related to territorial distinctions. The court said that the State might authorize a village, as it has done in the General Municipal Law, "to establish lighting and power plants and systems".

Section 360 of the General Municipal Law (see Appendix) neither provides for nor contemplates a territorial distinction within a municipality. The court also said:

> "When we consider the extent of the State highways and the necessity for keeping them safe for night travel, we must consider that the State has the

power to furnish light for this or any other public purpose";

And the court goes on to say that the General Municipal Law gives authority to villages to do the same.

The Court would never have decided the *Gaynor* case in the manner in which it did decide it if the four towns involved had been included in the district, and if their streets were to be lighted, and they were to receive other benefits such as D.S. will receive generally and specifically as an owner of property located within the Village.

The four excluded towns could not have prevented the establishment of a district including the whole county simply because the four excluded towns for one reason or another might choose not to take. If the four towns consumed two-thirds of the energy consumed in the entire county, and were already served by an existing utility and would not consent to be served by the Municipal plant, the court in the *Gaynor* case would never have declared the project to be invalid because it did not involve a plant three times too large to furnish what would be a normal demand of the excluded towns and other towns over a period of one or more years.

Distinguishing all of the petitioner's cases, we have already shown (1) that no special district has been created by the Village; (2) that it is a municipal enterprise for a public purpose and not a local improvement district confined to territory constituting only part of the Village; (3) that the plan is logical, sane and practical, and therefore not arbitrary or involving an abuse of power; (4) that the D.S. will be benefited; (5) that the project involves a Village purpose; (6) that if any tax were to be levied (which we deny) it would be an ad valorem tax which does

not require a benefit to all; (7) that even if the plan was not intended to serve the Village for public purposes and the distribution of energy were to be made only to private consumers, the D.S. would still be benefited by reason of the fact that a plant generating energy for D.S. would involve a substantial loss in operations and a tax to D.S. whether it took energy from the Village or did not.

There are multitudinous instances where general *ad valorem taxes* are levied for municipal purposes as against taxpayers who receive no benefits, as, for example, among others, taxes against unimproved property to support a fire department; taxes to support water systems as against unimproved property; taxes to support schools as against nonresidents, or a person or corporation without children; and many others.

3. *As to the claimed denial of equal protection.*

The argument which we have advanced under Subhead 1 above (p. 11) is equally pertinent to this particular subhead.

POINT II

The State Court did not abandon any distinctive characteristics of governmental functions as claimed by petitioner.

The question of a governmental function may be vitally important in many cases, e. g., questions of negligence; but it has little or nothing to do with the issues in this case.

The Village project provided for a public purpose when it planned to satisfy a number of Village purposes such as street lighting, operating its water plant, lighting its pub-

lic buildings and others. These were, as a matter of law, public Village purposes. (*Sun Publishing Assn. v. Mayor*, 8 A. D. 230; 152 N. Y. 257. *Palmer v. Larchmont*, 158 N. Y. 231.)

And the public purposes justify the issuance of Village bonds.

This would seem to be elementary. The incidental purpose of supplying energy to private parties did not destroy the public purpose. The supplying of energy to the Village itself was made still more economical by establishing a plant large enough to develop energy in excess of the exact requirements of the Village itself.

Section 2 of Article VIII of the New York Constitution provides:

> "No county, city, town, village or school district shall contract any indebtedness except for county, city, town, village or school district purposes, respectively."

That the Village was planning for a Village purpose is shown by the Statute under which it acted. (General Municipal Law: See Appendix.)

CONCLUSION

It is respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Dated, July 1, 1944.

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APPENDIX

General Municipal Law, Section 360, *Subsection* 1:

> "'Public utility service' as used in this article shall mean any service authorized to be furnished by any public utility company pursuant to article four of the public service law and shall include works, structures, poles, lines, wires, conduits, mains, systems, waterpower and any and all other real and personal property used or necessary for, connected with or appertaining to the furnishing of such service. 'Municipal corporations' as used in this article shall mean a county, city, town or village."

General Municipal Law, Section 360, *Subsection* 2:

> "Notwithstanding any general or special law, any municipal corporation may construct, lease, purchase, own, acquire, use and/or operate any public utility service within or without its territorial limits, for the purpose of furnishing to itself or for compensation to its inhabitants, any service similar to that furnished by any public utility company specified in article four of the public service law. For such purpose, any municipal corporation may purchase gas or electrical energy from the state, or from any state agency, or other municipal corporation, or from any private or public corporation.

(24)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 116

DESPATCH SHOPS, INC.,

Petitioner,

against

VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER FOR WRIT OF CERTIORARI

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VILLAGE OF EAST ROCHESTER, GEORGE SCHREIB, Mayor of the Village of East Rochester, LEE ARCURI, HAROLD L. BRAINERD, HAROLD KITCHEN and LLOYD V. WOOD, the last four being Trustees of the Village of East Rochester,

Respondents.

REPLY BRIEF

This petitioner for a writ of certiorari to review the determination of the Court of Appeals of the State of New York in this matter, in accordance with subdivision 4(a) of Rule 38 of the Rules of this Court herewith submits this brief, in reply to that submitted on behalf of the Respondent-Village.

The issue presented by the petition, succinctly stated, is whether a taxpayer, which is entirely excluded from any benefit from a proprietary venture proposed to be undertaken by a municipality, may nevertheless be subjected to taxation to make up any deficits which may occur from the operation of the project (Petition, p. 4).

The issue is not, as might be implied from a reading of the Respondent's brief, whether a municipal corporation may, in the exercise of a governmental function, incidentally offer, as a "sideline," benefits to certain taxpayers and not to others. Thus, the brief in opposition states that the proposed municipal electric plant and system, for the construction of which the Village would approach its constitutional debt limit and incur a long-term bonded indebtedness, would be built "for the principal purpose of operating its water system; the lighting of the streets and public buildings; and other Village purposes" and simply "as an incident * * * sell the excess to private consumers" (Respondent's brief, p. 3; see also, p. 23). Reference to the record, however, quickly dispels any such contention.

Whatever may have prompted the initiation of this village project (Respondent's brief, p. 3), the plan was to build an electric generating plant and distribution system to supply energy to the inhabitants of the municipality—with the exception of this petitioner—and also to furnish street lighting and other municipal needs. Thus the specifications for the proposed plant, in accordance with which the ordinance, as submitted to the voters, provided the project is to be constructed (R. 26; 501), state:

> "It is proposed to install a complete electric generating station and distribution system within the corporate limits of the Village of East Rochester for the purpose of producing electric energy and rendering electric service *to the inhabitants of the village* and to supply street lighting and other municipal requirements" (R. 494; emphasis supplied).

The report of the engineer commissioned to survey the project and prepare the plans and specifications points out that "the consumers of electric utility service in your village have every right to decide by their vote whether they shall continue to receive the service from a private corporation or to operate their own utility as a municipal enterprise" (R. 507), and that "one of the chief reasons for establishing a municipally owned electric system is to *lower the cost of electric service to the private consumers* and for municipal use" (R. 569; emphasis supplied). The pamphlet published and circulated prior to the election by the individual respondents listed as the first reason why the vote on the proposition should be favorable that the erection of a village power and light system would "reduce electric rates" (R. 49). Furthermore, from what source would the revenues, which are to be used first for the payment of the expense of operating and maintaining the project and for the payment of the principal of and interest on the bonds (R. 31), come except from private consumers?

Again, on page 4 of the brief it is said that the cost of the project, "with the generating plant specified and a distribution system adequate to serve all, *including D[espatch] S[hops]*", was $360,000. This assertion seeks to get away from the concession of counsel made at the trial that "the plant which is provided for in our plans and specifications, so far as generating capacity is concerned, would not supply Despatch Shops" (R. 249).

In a further attempt to avoid the flagrant omission of this petitioning taxpayer from any service from this plant, resort is made to the argument that the Village could purchase power from some outside source to supply the demands of the Shops (Brief, p. 5). That such

an assertion is purely a makeshift and an afterthought to escape the arbitrary treatment accorded this large taxpayer is also evident by examination of the record.

Nothing was said in the ordinance or resolution about the possible purchase of power to supply the Village or any of its inhabitants through a municipal distribution system. All that was said with reference to purchased power appears in the engineer's report wherein is discussed the possibility "as an alternative to constructing a power generating station" of "erecting the distribution system and purchasing energy" (R. 572). But even the engineer concluded that such an alternative proposition was impossible of consideration until it should be ascertained "if the power can be purchased at all" (R. 573). Moreover, the ordinance submitted to the voters mentioned nothing about the possibility of supplemental purchased power but stated that the proposition was "for the construction in and for the Village of East Rochester of a plant for the generation and a system for the furnishing and transmission of electrical energy for light, heat and power to the Village and for compensation to its inhabitants for municipal, domestic, residential, commercial and industrial uses" (R. 501; 26; 32; 35). And this single proposition was submitted despite the fact that the engineers suggested that the local law to be submitted for electoral approval should provide "for the purchase of electric energy as an alternative to the building of a generating station." (R. 577). Hence, it seems rather futile at this late date to contend, if only by way of veiled inference, that this glaring defect in the project could be corrected by some such expedient as the purchase of power.

A consideration of the record and all the attendant circumstances present therein leaves but one conclusion which no artful dissembling can eradicate—and that is, that this petitioner was definitely excluded from all service from this proposed plant and system. There can be no doubt, as pointed out in the petition herein (p. 7), that service was not only not contemplated for this consumer but that all such possibility thereof was removed. Thus, the engineer who made the preliminary survey and prepared the plans and specifications blandly states that he eliminated "this one large industrial consumer" from his considerations (R. 517; see also R. 525).

The Village Disregards All Well Known Distinctions Between the Dual Functions of Municipal Corporations

Without exception every case relied upon in the opposing brief dealt with the performance of purely governmental functions, for which all taxpayers must contribute ratably regardless of any particular individual benefit. In connection with the erection and maintenance of public buildings, the protection of the inhabitants against disease and unsanitary conditions, the exercise of the police power, the operation of a fire department, the promotion of education, and the like, the municipality acts as an agent for the state for governmental purposes (see *Trenton* v. *New Jersey*, 262 U. S. 182, 191). But in the instance concerned in the present application the Village is acting as an organization to care for local needs in its private or proprietary capacity.

This was clearly pointed out in one of the cases cited by the Respondent, *Village of Tupper Lake* v. *Maltbie*, 257 App. Div. 753, wherein the Court said at p. 757:

> "While it may be true that the village owes a duty to light the streets, if that be so considered, then it must also be considered that such duty devolves upon the village in its governmental capacity, while *as the owner of the plant it acts in its proprietary capacity.*" (Emphasis supplied.)

See also:

Los Angeles Gas & Electric Co. v. *City of Los Angeles,* 241 Fed. 912, 918-919, affirmed 251 U. S. 32;

Cf. City of New York v. *New York Telephone Co.,* 278 N. Y. 9, 14.

There is no question but that the erection and operation of a municipal electric plant and system is a "public purpose", as the Village argues (Brief, pp. 22-23). And this is so, whether it is supplying energy for strictly municipal needs or to inhabitants of the community. But, as pointed out above, the Village in carrying out such "public purpose" by so supplying such electricity would be exercising its purely private powers, as distinct from those which it performs as a strictly governmental organization. And while the Village unquestionably may engage in this proprietary venture, it cannot in so doing make service available to some taxpayers and not to others and at the same time hold the property of those discriminated against liable for assessment to make up any operating deficits. That is the complaint urged by this petitioner on this application.

So far as concerns the alleged "community" benefits, such as greater street lighting and lesser costs for the supplying of energy to public buildings and other mu-

nicipal operations (see Respondent's brief, p. 7), Despatch Shops, Inc. would share in any such benefits with the rest of the community. But one of the primary purposes of the project is to furnish electric energy generated at the plant to all the inhabitants of the Village—except this petitioner—for their personal and individual needs.

The only justification for such exclusion is that Despatch Shops uses a large amount of electric power in the operation of its business. However, if that is a valid excuse for so discriminating, there is nothing to prevent a municipality from proposing to construct a plant to supply, say only residential consumers and not any commercial or industrial consumers, but nevertheless subject the property of these business people to taxation to pay for any deficiencies from the operation and maintenance of such a plant and system for a "selected" group in the community. Any such proposal, as well as the instant one, runs counter to our Federal Constitutional safeguards.

The authorities cited in support of Respondent's contention are clearly not applicable to the factual situation presented in this application. Thus in *Missouri Pacific Railroad* v. *Western Crawford Road Improvement Dist.*, 266 U. S. 187, the State Legislature had created the improvement district and the commissioners made a study of the work to be done, the cost thereof and an estimate of the benefits and burdens. After this preliminary survey the project was abandoned because it was concluded that the cost of the proposed improvement would probably exceed the benefits. In making these studies the commissioners naturally incurred some expenses and, pursuant to the act creating the district, a tax was

levied on an *ad valorem* basis. The sole objection of the railroad was that the tax was not assessed in proportion to the benefit which it was estimated would have accrued if the improvement had been made. In overruling such contention this Court pointed out that "road building is a public purpose which may be effected by general taxation" and that "the preliminary inquiry whether it is desirable to construct the road is one in which all landowners within the district are interested" and concluded that "there is here no suggestion of that flagrant abuse or purely arbitrary exercise of the taxing power against which the Federal Constitution affords protection." (266 U. S. at p. 190).

In this instance, however, it is just such an abuse and purely arbitrary exercise of power—in subjecting this petitioner to taxation to make up deficits in the operation of a purely commercial enterprise although it is to be excluded from all the benefits which all other inhabitants, taxpayers and non-taxpayers alike, may enjoy—about which complaint is made.

Miller & Lux, Inc. v. *Sacramento & San Joaquin Drainage District,* 256 U. S. 129, is to the same effect as the *Western Crawford Road Improvement* case, *supra.* And in that case the Court, in denying the petition for certiorari and dismissing the writ of error, specifically pointed out (256 U. S. at p. 131) that the allegations of the complaint therein were "wholly insufficient to raise the issue in respect to arbitrary legislative action presented by *Myles Salt Co.* v. *Iberia & S. M. Drainage Dist.,* 239 U. S. 478."

Paducah-Illinois Railroad Co. v. *Graham,* 46 F. (2d) 806 (W. D. Ky.), instead of supporting Respondents' contention, reaffirms our position. There a county board of education laid off boundaries of a consolidated com-

mon school district—a governmental function as distinct from proprietary—and an election was held in such consolidated district on whether or not to levy a tax to provide grounds and buildings and other school purposes within the district. The vote was in favor of the tax. Included in the district was acreage covered by the Ohio River and the only improvement and the only taxable property of any value on or over that part of the acreage covered by the River was the railroad company's bridge. Despite the finding that the tax was a general tax levied upon the assessed value of all property in the district, without regard to benefits accruing to the property taxed, and not a special assessment or a local improvement tax, the Court nevertheless declared the creation of the district and the levy of the tax void for the reason that the "inclusion of the plaintiff's railroad bridge in the taxing district is so unnatural and so unreasonable as clearly to show that the sole purpose of the inclusion was to add to the taxable value of the property in the district" and "that this action of the board was arbitrary and unreasonable, and violates plaintiff's federal constitutional rights" (46 F. [2d] at pp. 810-811).

Here we have the same purpose sought to be accomplished by a reverse means. By the ordinance under which this village electric plant and system are to be constructed any moneys, not derived from the operating revenues of the project, "necessary to pay the principal of and interest on said bonds shall be raised by tax on the taxable property in said Village" (R. 31; 29). The petitioner pays approximately one seventh of all taxes collected in the Village (R. 131; 156-157; 204) and will thus be obligated to make up one seventh of all annual deficits from the operation of the plant. Nevertheless, as

has been pointed out above, it is excluded from using any of the energy to be generated from the plant—although all others have the right to take and use such energy—and in fact, as the proposition was submitted and voted upon, from having any benefit whatsoever from the project. Such "action of the board was arbitrary and unreasonable, and violates [petitioner's] federal constitutional rights."

Houck v. *Little River Drainage District*, 239 U. S. 254, and kindred cases, dealt with governmental subdivisions of a state which, as this Court pointed out, "exercise the granted powers within their territorial jurisdiction 'as fully, and by the same authority, as the municipal corporations of the state exercise the powers vested by their charters.'" The district was "constituted a political subdivision of the state for *the purpose of performing prescribed functions of government*" (239 U. S. at p. 262). The expenses of such enterprises can, of course, be met by general taxation, or if it is deemed desirable, by the creation of tax districts, to meet the authorized outlays—in that instance a preliminary tax to cover initial costs of survey, etc., which it "was not necessary to base * * * upon special benefits accruing from a completed plan" as "these outlays for organization and preliminary surveys could well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns." (239 U. S. at p. 266).

In *Mount St. Mary's Cemetery Association* v. *Mullins*, 248 U. S. 501, it was found on the evidence that the sewers proposed to be constructed actually benefited the plaintiff's lands in that the sewers served to carry away surface water therefrom and there was no evidence that the cemetery would not be benefited as to sanitation as

a result of the project. Here, we have a situation wherein it is established that the taxpayer would not receive any benefit from the plant and yet would have to stand behind it. And hence it is believed we fall squarely within the principle of *Myles Salt Co.* v. *Iberia & St. Mary's Drainage Dist.*, 239 U. S. 478, in that it is sought "to embrace property in no wise benefited within the limits of a [taxing] district" (248 U. S. at p. 505).

Conclusion

We reiterate that we are here confronted with the anomolous situation of a municipality seeking to embark on a purely private enterprise to supply a service to all the inhabitants of the community save one—this petitioner—and yet pledge the taxable property of this petitioner to stand behind the bonded indebtedness necessary to be incurred to construct the plant and system. This is a case of first impression, so far as we have been able to discover, wherein a municipal corporation has endeavored to engage in such a business for the ostensible benefit of most of the inhabitants but to the exclusion of some. In the words of the dissenting judges of the New York Court of Appeals such "will result in an unconstitutional taking of property through illegal taxation" (R. 700).

Under these circumstances, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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